

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
July 7, 2009 Session

TIMMIE LEE RHEAL, ET AL. v. MARK IRELAND, ET AL.

**Appeal from the Circuit Court for Marion County
No. 16077 Thomas W. Graham, Judge**

No. M2009-00112-COA-R3-CV - Filed September 15, 2009

Plaintiffs sued the juvenile court and county under the Tennessee Governmental Tort Liability Act, Tenn. Code Ann. § 29-20-101 *et seq.* (“TGTLA”), alleging negligence for failure to post security personnel at the courthouse and seeking to recover for injuries allegedly sustained as the result of an assault. We affirm the finding of the trial court that the decision to hire and/or post an officer at the courthouse is a discretionary function for which the defendants had immunity under the TGTLA.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court
Affirmed**

PATRICIA J. COTTRELL, P.J., M.S., delivered the opinion of the court, in which FRANK G. CLEMENT, JR. and ANDY D. BENNETT, JJ., joined.

Keith H. Grant, Dunlap Tennessee, for the appellants, Timmie Lee Rheal and husband, Milford Rheal.

Ronald D. Wells, Stacy Lynn Archer, Chattanooga, Tennessee, for the appellees, Mark Ireland, Rhonda Ireland, Sandra Ireland, Tammy Thomas, Juvenile Court for Marion County, Tennessee, and Marion County, Tennessee.

OPINION

Timmie Lee Rheal and her husband, Milford Rheal, sued the Juvenile Court for Marion County and Marion County, Tennessee (hereinafter collectively referred to as “County”) for damages associated with an alleged attack on Ms. Rheal on the sidewalk outside the courthouse.¹ The County was sued under the Tennessee Governmental Tort Liability Act, Tenn. Code Ann. § 29-20-101 *et seq.* (“TGTLA”), for negligence.

¹Ms. Rheal also made claims against her alleged assailants in the lawsuit which are not at issue in this appeal.

The following facts are basically uncontradicted. Ms. Rheal appeared to testify at the Juvenile Court for Marion County on December 3, 2003. According to the Rheals' complaint and Ms. Rheal's affidavit, the County had notice that an officer should have been posted at the Juvenile Court on that date. Ms. Rheal alleges that during a break, she was maliciously assaulted outside the Juvenile Court by four assailants. According to Ms. Rheal, the incident did not occur in the courthouse but on the sidewalk outside the courthouse. Ms. Rheal's complaint seeks to recover damages for the County's alleged negligence "in not having a police officer stationed in or outside of the Juvenile Court of Marion County."

The County filed a motion for summary judgment² supported by plaintiffs' Answers to Interrogatories, the affidavit of an eyewitness to the incident, Alan Beard, and excerpts from the depositions of the County Mayor and juvenile probation officer.³ Ms. Rheal filed her affidavit.

The trial court granted the County's motion for summary judgment on several grounds. First, the court held that since the incident occurred on the sidewalk and since the City of Jasper and not the County had responsibility and control over the sidewalks, then the County is not liable for incidents on the sidewalk. The trial court found, in effect, that the County had no legal duty to patrol the sidewalks. Second, the trial court found that the decision to post an officer in or outside the courthouse is a discretionary policy decision for which immunity applies under the TGTLA.

The Rheals appealed.

I. SUMMARY JUDGMENT

A trial court's decision on a motion for summary judgment enjoys no presumption of correctness on appeal. *Martin v. Norfolk Southern Railway Co.*, 271 S.W.3d 76, 84 (Tenn. 2008); *Blair v. West Town Mall*, 130 S.W.3d 761, 763 (Tenn. 2004). We review the summary judgment decision as a question of law. *Id.* Accordingly, this court must review the record *de novo* and make a fresh determination of whether the requirements of Tenn. R. Civ. P. 56 have been met. *Eadie v. Complete Co., Inc.*, 142 S.W.3d 288, 291 (Tenn. 2004); *Blair*, 130 S.W.3d at 763.

The moving party has the burden of demonstrating it is entitled to judgment as a matter of law and that there are no material facts in dispute. *Martin*, 271 S.W.3d at 83. To be entitled to summary judgment, a defendant moving party must either (1) affirmatively negate an essential element of the non-moving party's claim or (2) show that the nonmoving party cannot prove an essential element of the claim at trial. *Hannan v. Alltel Publishing Co.*, 270 S.W.3d 1, 9 (Tenn. 2008). If the party seeking summary judgment makes a properly supported motion, the burden shifts

²The county actually filed the motion for summary judgment but both government defendants were ultimately dismissed on the same grounds.

³Mr. Beard was representing Ms. Rheal in the proceedings that gave rise to the incident and witnessed the assault.

to the nonmoving party to set forth specific facts establishing the existence of a genuine issue of material fact. *Martin*, 271 S.W.3d at 84; *Hannan*, 270 S.W.3d at 5; *Staples v. CBL & Associates*, 15 S.W.3d 83, 86 (Tenn. 2000) (citing *Byrd v. Hall*, 847 S.W.2d at 215).

II. TENNESSEE GOVERNMENTAL TORT LIABILITY ACT

Under the TGTLA, governmental entities⁴ are immune from suit for injuries that occur due to discharge of their functions. Tenn. Code Ann. § 29-20-201; *Hill v. City of Germantown*, 31 S.W.3d 234, 236 (Tenn. 2000) (citing *Hawks v. City of Westmoreland*, 960 S.W.2d 10, 14 (Tenn. 1997)). There are, however, several statutory exceptions to this immunity. *Hill*, 31 S.W.3d at 236-37. The exception that is relevant in this matter concerns negligence by county employees. There is, however, a statutory exception to this removal of immunity for the performance of or failure to perform discretionary functions. Tenn. Code Ann. § 29-20-205 reads in pertinent part:

Immunity from suit of all governmental entities is removed for injury proximately caused by a negligent act or omission of any employee within the scope of his employment **except** if the injury arises out of:

(1) the exercise or performance or the failure to exercise or perform a discretionary function, whether or not the discretion is abused. (emphasis added).

Consequently, it is clear that immunity cloaks governmental entities from liability arising from discretionary functions. What is less clear, however, is what is encompassed by the phrase “discretionary function.” The TGTLA is silent as to its meaning.

The Supreme Court in *Bowers v. City of Chattanooga*, 826 S.W.2d 427, 430-31 (Tenn. 1992), established the standard for deciding whether an act or decision is discretionary within the meaning of Tenn. Code Ann. § 29-20-205(1):

Today we approve of the analysis that determines which acts are entitled to immunity by distinguishing those performed at the “planning” level from those performed at the “operational” level. As Chief Justice Shepard of Indiana said in *Peavler v. Board of Commissioners*, 528 N.E.2d 40, 45 (Ind.1988):

The distinction between planning and operational functions is a standard, rather than a precise rule. The focus must remain on the policy underlying governmental immunity. If the act is one committed to coordinate branches of the government involving policy decisions not reviewable under traditional tort standards of reasonableness, the government is immune from liability even if the act was performed negligently.

⁴Governmental entities are defined to mean political subdivisions of the state. Tenn. Code Ann. § 29-20-102.

...

Under the planning-operational test, decisions that rise to the level of planning or policy-making are considered discretionary acts which do not give rise to tort liability, while decisions that are merely operational are not considered discretionary acts and, therefore, do not give rise to immunity. *See Carlson v. State*, 598 P.2d 969, 972 (Alaska 1979). The distinction between planning and operational depends on the type of decision rather than merely the identity of the decision maker. *See id.* We caution that this distinction serves only to aid in determining when discretionary function immunity applies; discretionary function immunity attaches to all conduct properly involving the balancing of policy considerations. Therefore, there may be occasions where an “operational act” is entitled to immunity, where, for instance, the operational actor is properly charged with balancing policy considerations. *See United States v. Gaubert*, 499 U.S. 315, 111 S.Ct. 1267, 113 L.Ed.2d 335 (1991) (recognizing that operational activities grounded in policy are entitled to discretionary function immunity).

Under the planning-operational test, discretionary function immunity does not automatically attach to all acts involving choice or judgment. Such an analysis recognizes that, to some extent, every act involves discretion. Rather, the underlying policy of governmental immunity is better served by examining (1) the decision-making process and (2) the propriety of judicial review of the resulting decision. *Cf. Peavler*, 528 N.E.2d at 46 (examining the nature of the conduct, its effect on governmental operations, and the capacity of a court to evaluate the decision).

A consideration of the decision-making process, as well as the factors influencing a particular decision, will often reveal whether that decision is to be viewed as planning or operational. If a particular course of conduct is determined after consideration or debate by an individual or group charged with the formulation of plans or policies, it strongly suggests the result is a planning decision. These decisions often result from assessing priorities; allocating resources; developing policies; or establishing plans, specifications, or schedules. *See id.*

On the other hand, a decision resulting from a determination based on preexisting laws, regulations, policies, or standards, usually indicates that its maker is performing an operational act. Similarly operational are those ad hoc decisions made by an individual or group not charged with the development of plans or policies. These operational acts, which often implement prior planning decisions, are not “discretionary functions” within the meaning of the Tennessee Governmental Tort Liability Act.

Bowers, 826 S.W.2d at 430-31.

Whether the discretionary function exception applies is determined by the “decision-making process” and not the “status of the actor.” *Limbaugh v. Coffee Medical Center*, 59 S.W.3d 73, 85 (Tenn. 2001).

III. ANALYSIS

The Rheals argue the County was negligent in failing to have sufficient security personnel posted, *i.e.*, in failing to station a police officer in the vicinity of the courthouse.⁵ The County filed excerpts from the deposition of the mayor of Marion County to prove that the decision to have a police officer at the court meets the standard of a discretionary function or policy decision as described in *Bowers*. According to the mayor, in order to have officers at the court, the County Commission must appropriate funds and then the Sheriff hires the officer. In fact, after this particular incident involving Ms. Rheal, the newly elected judge brought the issue of hiring an armed police officer for the court up to the County Commission and its finance committee. After approval by the County Commission, the Sheriff then hired an armed guard to be posted at the courthouse. According to the uncontradicted proof, the Marion County Commission has the responsibility to, in effect, create positions and appropriate funds for the hiring of officers. The Sheriffs’ office then hires the actual officers and assigns their duties.

The decisions to hire an officer to provide security for the Juvenile Court and/or to post an officer there for that purpose are clearly discretionary policy decisions for the County Commission and/or Sheriff, under the standard discussed in *Bowers*. The decision whether to hire and/or post an armed security officer at the courthouse, according to the mayor’s deposition testimony, required the County Commission and its finance committee to assess priorities and allocate financial resources. This type of decision by a deliberative body meets the planning standard of *Bowers* to be considered a discretionary function. As a result, under the TGTLA the County is immune from any liability arising from the failure to hire and/or post an officer at the courthouse. Consequently, the trial court is affirmed.

On appeal, the parties present arguments concerning whether the County had a duty to post an officer on the sidewalk outside the courthouse and whether the Public Duty Doctrine is applicable under these set of facts. Since the County is immune, then whether or not a duty existed is not determinative. Likewise, the public duty doctrine comes into play only if the governmental entity is not immune under the TGTLA. *Matthews v. Pickett County*, 996 S.W.2d 162, 164-65 (Tenn. 1999). Therefore, examination of both these issues is pretermitted by a finding of immunity.

⁵The County introduced excerpts from the deposition of Timothy Dewayne Murphy, the probation/juvenile youth officer who also served as the juvenile court officer. Mr. Murphy testified that his duties while serving as court officer were to open court, call witnesses, and on occasion call for quiet. He had no security training and was not there to protect third parties. According to Mr. Murphy, he was not aware of any policy governing security at the juvenile court.

The trial court is affirmed. Costs of this appeal are assessed against the appellants, Timmie Lee Rheal and Milford Rheal, for which execution may issue if necessary.

PATRICIA J. COTTRELL, P.J., M.S.